EMERGENCY

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

STATE OF ALASKA,

Petitioner,

vs.

CARMEN PERZECHINO JR.,

Respondent.

Court of Appeals No. A-_____

Trial Court No. 3KN-19-00318 CR

EMERGENCY PETITION FOR REVIEW

VRA CERTIFICATION. I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

The State of Alaska seeks interlocutory review of Superior Court Judge Jennifer Wells's ruling allowing the videoconference testimony of a witness with high-risk health conditions in light of the COVID-19 pandemic. This petition for review is unusual because the State seeks review of an order in which it prevailed. Nevertheless, immediate review is appropriate for reasons that outweigh the policy generally requiring appeals or petitions to be taken only from adverse decisions. *See* Appellate Rule 402(a). In Alaska, jury trials were suspended in March 2020, as the COVID-19 pandemic spread across the country and disrupted many societal norms that were once taken for granted. As new legal issues arise directly related to the pandemic, the appellate courts should provide guidance on how to proceed during these unprecedented times. Discretionary review in this case will provide

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necessary guidance as trial courts consider whether witnesses must testify in person even if doing so would put their health at risk.

Appellate Rule 402(b) contemplates immediate review if postponement of review could result in injustice because of "unnecessary delay, expense, hardship or other related facts" or if the order "involves an important question that could affect other cases and the public interest." These factors are present here. Appellate review of this order is appropriate now because the extreme backlog of cases awaiting trial because of COVID-19 means the State simply cannot afford to retry cases.[1] Second, a ruling on this issue could assist moving other cases in that backlog to trial despite the pandemic. Third, the SANE nurse's testimony is likely to be crucial, which will make it difficult to argue harmlessness in a subsequent appeal of this order after trial. Simply stated, this issue cannot be put off for the years it will take to resolve the question through the merit appeal process.

Although jury trials are generally suspended, the presiding judge found that an exception was warranted in this case. The State's attorney originally did not object to setting trial in this case, but once the myriad logistical and practical hurdles became known the State belatedly moved for reconsideration of the trial setting order. [Att. 10] Reconsideration was denied on October 8, 2020.[2] [Att. 11]

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[1] As of September 11, 2020, the Alaska Court System reported 18,815 pending criminal cases, an increase of 4,100 from the same date in 2019, and 6,443 more criminal cases than were pending in 2018. [Att. 9]

[2] The State is not petitioning for review of this order because of the unusual procedural posture of that motion work.

Voir dire began the morning of Monday, October 12, 2020. The State asked Judge Wells not to swear in a jury until this petition is resolved, but Judge Wells indicated her intent to proceed with jury selection and trial. [Att. 8]

A. Issue Presented For Review

Does permitting the videoconference testimony of a necessary witness, during a pandemic and based on that witnesses' high-risk health conditions, violate a defendant's constitutional right to confrontation? In the alternative, if videoconference testimony of a necessary witness is constitutionally impermissible, should this trial be postponed until the witness can safely testify in-person?

B. Factual and Procedural Background

In 2001, A.S. reported that an unknown man who offered her a ride sexually assaulted and kidnapped her. As part of the investigation, a Sexual Assault Nurse Examiner (SANE) conducted a sexual assault examination and collected swabs from A.S.'s vaginal area. The Alaska State Troopers investigated the case, but were unable to identify A.S.'s assailant. In 2018, as part of a federally funded grant project, the troopers submitted for DNA testing the swabs taken from A.S.'s sexual assault kit. Analysts developed a male DNA profile that, when entered into the national CODIS database, matched a known profile for Carmen Perzechino. [Att. 1 (information)]

In 2019, a grand jury indicted Perzechino for two counts of first-degree sexual assault and one count of kidnapping based on the 2001 assault.

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At the beginning of 2020, a new virus, COVID-19, began to spread around the world, rapidly evolving into a pandemic the likes of which the world has not experienced in over 100 years. To date, more than 7.5 million cases of COVID-19 have been reported in the United States, resulting in more than 200,000 deaths. *See* Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): CDC COVID Data Tracker, available at https://covid.cdc.gov/covid-data-tracker/#cases_totalcases (last accessed Oct. 10, 2020). More than 8,800 cases have been reported in Alaska, including 59 deaths. *See id*.; Alaska Dep't of Health and Soc. Servs., Alaska Coronavirus Response Hub, *available at* https://coronavirus-response-alaska-dhss.hub.arcgis.com/ (last accessed Oct. 8, 2020).

To combat the spread of the virus, Governor Mike Dunleavy issued a series of mandates affecting local businesses, schools, travel, and more. *See* State of Alaska, COVID-19 (Coronavirus) Information, *available at* https://covid19.alaska.gov/health-mandates/ (last accessed Oct. 8, 2020). Alaska's courts shut down many in-person proceedings, including jury trials. In his most recent special order, Chief Justice Joel Bolger announced that misdemeanor jury trials may resume on November 2, 2020, and directed all other jury trials remain suspended until at least January 4, 2021, unless a presiding judge finds exceptional circumstances. *See* Chief Justice Special Order No. 8194 (Sept. 24, 2020).

Here, Presiding Judge William Morse found exceptional circumstances for Perzechino's case to proceed to trial, and later denied reconsideration of that order, focusing exclusively on the age of the case rather than the date of indictment or other competing logistical problems.

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After the order setting trial, the State learned of an essential witnesses' fragile medical status. Specifically, Debra Blizzard, the SANE, who has an autoimmune disorder that makes her particularly susceptible to both contracting COVID-19 and developing potentially fatal complications from the disease. [Atts. 2, 4] Based on Nurse Blizzard's high-risk health conditions, the State filed a motion to allow the nurse to testify via videoconference.[3] [Att. 2] The State noted the trial court's intent to implement safety measures in light of the pandemic, but Nurse Blizzard stated that those measures are insufficient to protect her in light of her serious health conditions, which include an autoimmune disorder, multiple sclerosis, and two bone grafts.[4] The State noted that the constitutional right to confront witnesses does not categorically prohibit videoconference testimony. The State argued that a witness should not have to put her life or health at risk by testifying in person when a defendant's rights can be satisfied through videoconference testimony. Alternatively, if the motion for videoconference testimony were denied, the State asked that the trial be postponed until the nurse can safely enter the courtroom to testify in person.

The nurse appeared telephonically at a subsequent hearing. She testified that she is unwilling to come to court to testify in-person because she is worried about the courthouse ventilation system and the inability of cloth masks to prevent the transmission

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[3] The motion was filed confidentially because it contained medical information.

[4] The trial court intends to place Plexiglas around the witness stand, wipe down the witness stand between witnesses, implement social distancing measures in the courtroom, and require masks or face shields to be worn by all courtroom participants other than the witness. The court also offered to allow the witness to avoid the courthouse's main entrance. [Att. 8]

of COVID-19. Nurse Blizzard also stated that viruses can mutate, and expressed her expectation as a medical professional, that the second round may be worse than the first. The nurse discussed her autoimmune disorder, and explained how her fragile health makes her more vulnerable to the virus. The nurse stated that she is essentially homebound; neighbors bring her food, and if she goes into a public place, she is "in and out within five minutes." [Att. 3 (log notes of confidential portion of hearing); Audio of 09/29/2020, Track 1 at 2:55-7:50][5] At Perzechino's request, and after cross-examination, the nurse submitted a note from her doctor stating that she should not appear in the courthouse due to her autoimmune disorder. [Att. 4]

Perzechino's attorney opposed videoconference testimony, but he expressed his expectation that the court would allow the nurse to testify by videoconference. [Att. 3, 5; Audio of 09/29/2020, Track 1 at 9:55-10:00, Track 2 at 0:00-1:30; Audio of 10/1/2020 Track 4 at 1:00] The attorney later confirmed his opposition, commenting, apparently sarcastically, "Who cares about confrontation?" [Att. 5; Audio of 10/7/2020, Track 3 at 0:20]

The superior court signed the State's proposed order—without issuing additional findings—and granted the motion to allow the nurse to testify via videoconference. [Att. 7] Judge Wells commented that this would not be the last time the issue arose due to the pandemic. [Att. 6; Audio of 10/7/2020. Track 2 at 9:40] The judge briefly noted that videoconference testimony was necessary in light of the nurse's fragile health, and that all

[5] The State received the audio recordings from the court in a format with 10 minutes of content per track.

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parties' rights could be protected. [Att. 6; Audio of 10/7/2020, Track 2 at 9:50, Track 3 at 0:00-0:30]

The prosecutor noted that the issue of videoconference testimony was likely to be repeated over the next several months as jury trials begin again, and a number of cases potentially would need to be retried if an appellate court determines that videoconference testimony violates the right to confrontation. [Att. 8] She asked the trial court to stay the trial for one week to allow the State to petition this Court for guidance. [Att. 8] Judge Wells denied the request for a stay. [Att. 8]

C. Argument

1. A defendant's confrontation rights are not absolute

Witnesses generally should testify in person in the courtroom. *See* Criminal Rule 38.3(a). Absent an agreement between the parties, the Criminal Rules allow videoconference testimony if "(1) the requesting party establishes that testimony by two-way video conference is necessary to further an important public policy; (2) the requesting party establishes that the witness is unavailable; and (3) the testimony is given under oath and subject to cross-examination." Criminal Rule 38.3(b). This rule may be relaxed or dispensed with, subject to a defendant's constitution right of confrontation. Criminal Rule 53.

"In all criminal prosecutions," the accused has the right "to be confronted with the witnesses against him." U.S. Const. amend. VI; Alaska Const. art. I, § 11. Courts generally have not construed Alaska's constitution to provide a broader right to

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confrontation than the federal constitution. *See Luch v. State*, 413 P.3d 1224, 1235 (Alaska App. 2018) (rejecting cursory argument that Alaska Constitution provides a greater right to confrontation); *Reutter v. State*, 886 P.2d 1298, 1308 n.8 (Alaska App. 1994) (same).

The Confrontation Clause generally "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact," but this guarantee is not "absolute." *Maryland v. Craig*, 497 U.S. 836, 844 (1990) (quoting *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988)).

In *Coy v. Iowa*, the Supreme Court held that placing a screen between an accused sex offender and his alleged child victims at trial violated the defendant's right of confrontation. 487 U.S. at 1020. The Court found that generalized findings of trauma to victims were insufficient to overcome a defendant's interest in a face-to-face meeting. *Id*. at 1021. The Court declined to consider whether any exceptions to the face-to-face requirement exist, noting that any exceptions "would surely be allowed only when necessary to further an important public policy." *Id*. In a concurring opinion, Justices O'Connor and White noted the prevalence of rules allowing testimony via closed circuit television, suggesting, "such procedures may raise no substantial Confrontation Clause problem since they involve testimony in the presence of the defendant." *Id*. at 1022-25.

In *Maryland v. Craig*, the Court held that a witness's testimony via one-way closed circuit television did not violate the right to confrontation. *Craig*, 497 U.S. at 840. The Court noted four "elements" of confrontation: "[1] physical presence, [2] oath, [3] cross-examination, and [4] observation of demeanor by the trier of fact." *Id*. at 846. These elements serve to ensure that evidence against the accused is "reliable and subject to the

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rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." *Id*. The Court noted that the right of confrontation is "functional" and "symbolic," and it is meant to promote reliability at trial. *Id*. (citing *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987); *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *Lee v. Illinois*, 476 U.S. 530, 540 (1986)). The Court noted that it had "never insisted on an actual face-to-face encounter at trial in *every* instance in which testimony is admitted against a defendant." *Id*. at 847-48 (noting that certain hearsay statements are allowed). The Court held that the Confrontation Clause reflects a "preference" for face-to-face confrontation, which "must occasionally give way to considerations of public policy and the necessities of the case." *Id*. at 849.

The *Craig* Court noted that the closed circuit television testimony prevented the child witness from seeing the defendant, but it "preserve[d] all of the other elements of the confrontation right." 497 U.S. at 851. The witness testified under oath and was subject to contemporaneous cross-examination. *Id*. The judge, jury, and defendant were able to view the witness's demeanor through the video monitor. *Id*. The Court was "mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding," but it found that the other safeguards—oath, cross-examination, and observation—adequately subjected the witness to rigorous adversarial testing "in a manner functionally equivalent to that accorded live, in-person testimony." *Id*. Such procedures are "a far cry from the undisputed prohibition of the Confrontation Clause: trial by *ex parte* affidavit or inquisition." *Id*.

Having found that the constitution does not categorically prohibit video testimony, the Court considered whether the use of the procedure was necessary to further

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an important state interest. *Craig*, 497 U.S. at 852. The Court found a compelling state interest in protecting minor victims of sex crimes from further trauma and embarrassment, and found that in some cases this interest may be important enough to outweigh a defendant's right to face his accusers in the courtroom. *Id*. at 852-53. The Court held that the government must make a case-specific showing of necessity. *Id*. at 855-56.

Following *Craig*, this Court upheld the constitutionality of Alaska's statute permitting children to testify by closed circuit television or behind one-way mirrors. *See Reutter*, 886 P.2d at 1306-07; AS 12.45.046. The State must meet the requirements of the statute and *Craig* by clear and convincing evidence before a child witness may testify through one of these methods. *Reutter*, 886 P.2d at 1308.

Other courts have allowed contemporaneous video testimony when a witness was too ill to come to court. *See Horn v. Quarterman*, 508 F.3d 306, 313-20 (5th Cir. 2007); *United States v. Benson*, 79 Fed. App'x 813, 820-21 (6th Cir. 2003) (unpublished); *Bush v. State*, 193 P.3d 203, 215-16 (Wyo. 2008); *Lara v. State*, 2018 WL 3434547, at *4 (Tex. App. July 17, 2018) (unpublished).

2. A balance must be struck between preserving a defendant's rights, protecting public health, and reopening the judicial system

The public has a strong interest in reopening the courts to the extent it can be done safely, while preserving the physical health of witnesses and other trial participants. Although the COVID-19 pandemic may not support a blanket rule allowing videoconference testimony from all witnesses, it provides good reason to permit videoconference testimony on a witness-by-witness basis. The need to protect the health

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of witnesses who will be at high risk if they contract the virus is sufficient to overcome the "subtle effects face-to-face confrontation may have on an adversary criminal proceeding." *Craig*, 497 U.S. at 851. Although protective measures may decrease the risk of spreading or contracting the virus, the consequences are severe for a high-risk witness who contracts the disease.

In this case, allowing the nurse to testify via videoconference, under oath and subject to cross-examination, protects Perzechino's right of confrontation while also advancing important public interests.

D. Reasons for Granting Review

An "aggrieved party" may file a petition for review of a non-appealable order. Appellate Rule 402(a)(1). Perzechino is under no obligation to seek immediate review of the trial court's decision; he may proceed with trial and, if convicted, appeal the decision to allow videoconference testimony. The State is not an aggrieved party in the ordinary sense, but review is appropriate because the "sound policy behind the rule requiring appeals or petitions for hearing to be taken only from final judgments or decisions is outweighed" in this case. Appellate Rule 402(b).

In Alaska, justiciability is a judicial rule of self-restraint which courts generally adhere to in order to avoid resolving abstract questions or issuing advisory opinions. *Moore v. State*, 553 P.2d 8, 23, n.25 (Alaska 1976). Requiring adversity between parties assures that a question presented is appropriate for judicial determination. *Id*. In certain circumstances, however, appellate courts find that the interest in articulating a clear rule

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will overcome the interest in judicial restraint. *See, e.g., In re Daniel G.*, 320 P.3d 262, 267 (Alaska 2014) (the mootness rule is subject to exception based on public interest and collateral consequences). Indeed, courts already have issued general guidance on how jury trials should be conducted during the pandemic. *See* Chief Justice Special Order No. 8194 (Sept. 24, 2020).

This case involves an important question of law on which there is substantial ground for difference of opinion, and an immediate review of the order will advance important public interests that may be compromised if review is delayed. *See* Appellate Rule 402(b)(2). At issue is how to properly balance a defendant's constitutional right to confrontation with the public's interest in restarting jury trials in a manner that is safe for all participants, including vital witnesses with serious health conditions. Although courts have considered videoconference testimony before, they have not done so in the context of a global pandemic, where the very act of coming to court may put a person at risk. If videoconference testimony of a witness with serious health conditions violates the right to confrontation, then going forward with trial would needlessly waste the time and resources of all of the participants. Requiring in-person testimony when videoconference testimony can adequately protect a defendant's rights would needlessly risk not only the health of the particular witness, but also the health of the other courtroom participants who must meet in-person at a time when society is being urged to stay home and adopt social distancing measures.

Postponement of this issue would cause unnecessary delay, expense, and inconvenience to the parties in this case and other cases. *See* Appellate Rule 402(b)(1). The

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pandemic has already caused great delays for many defendants and victims who are currently awaiting trial, and the issue of videoconference testimony is likely to arise as long as the pandemic persists. Many witnesses may be reluctant to testify in person, particularly if they are at high risk or would need to travel. As jury trials begin again, the backlog of cases should be dealt with as efficiently as possible in order to avoid the possibility of retrial based on legal issues that could have been resolved on an interlocutory basis. If videoconference testimony from an important witness is eventually found unconstitutional years later on appeal, then trials should be postponed until the witness can safely testify in person. Courts, parties, witnesses, and jurors may then devote their time and resources to cases that have no such pandemic-related obstacles.

This case presents a clear question of law that is amenable to appellate review: whether videoconference testimony in light of the pandemic and the nurse's health conditions will violate Perzechino's right of confrontation. The parties have taken adverse positions on the issue, and both parties have an incentive to resolve this question before trial in order to avoid the cost, delay, and inconvenience of a potential second trial on these unclassified felonies. It is unlikely that a full record following a trial would help an appellate court gauge the subtle ways in which video testimony might differ from face-to-face testimony. *Cf. Craig*, 497 U.S. at 851. This issue is sure to arise in additional cases in the coming months or years as jury trials begin again and courts and attorneys try to clear a backlog of pandemic-era cases. This Court should review this issue and provide guidance for trial courts and litigants.

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E. Conclusion

This Court should grant the petition for review and hold that videoconference testimony from the nurse, by itself, will not violate Perzechino's right of confrontation. In the alternative, if this Court finds videoconference testimony by the nurse is a violation of Perzechino's right to confront witnesses, this Court should order this trial postponed until the witness can appear to testify in-person.

DATED this 12th day of October, 2020.

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